

## **TESTIMONY OF GREGORY SCHMIDT**

Good morning Mr. Chairman, Ranking Member Markey, Members of the Committee. I am Gregory Schmidt, Vice President of New Development and General Counsel for LIN Television Corporation. I appear today on behalf of the National Association of Broadcasters.

Let me begin by articulating how enthusiastic local television broadcasters are about the possibilities being discussed in this hearing today. We are excited about new and innovative Internet services such as video over broadband. Broadcasters, like many others, see great promise in what this new platform has to offer. Video over broadband has the potential to introduce much needed competition into the multi-channel programming distribution marketplace. We see this as a positive development for consumers and broadcasters.

As we embrace new technologies, however, it is vital that the policies you adopt continue to recognize the importance of maintaining a robust system of local, over-the-air television. Competition may eventually lead to deregulation of all video media, but until it does, existing policies designed to promote competition, diversity and intellectual property rights must extend to all multi-channel platforms. Thus, I encourage you to explore important questions such as: How will policies designed to protect and promote public access to important local information be realized for this new service? How will local rights to content such as sports, network and syndicated programming be protected? These are questions that you asked and answered as cable and satellite technology developed. They are once again questions to be asked as you address public policy issues related to this new service. And they should be asked in two contexts. First, how will

these policies affect content providers such as broadcasters, and second how will they affect competition among content distributors such as cable satellite, and now potentially new distribution technologies.

### ***Local Television***

The American television system is an integral part of the fabric of this country. Television is not just an entertainment medium. From its very beginning, Americans have turned to television and over-the-air broadcasting for vital news and information. Indeed, often in the case of weather emergencies, when the multi-channel systems such as cable and satellite are unavailable, over-the-air broadcasting is the only way to get life-saving information to the public. Thus, it is not surprising that Congress, the courts and the Federal Communications Commission ("FCC") have consistently recognized that public access to a healthy, free-over-the-air broadcast system is an important federal interest.

Our country has made a substantial investment in free, local over-the-air service. Unlike many other countries that offer only national television channels, the United States has succeeded in creating a rich and varied mix of *local* television outlets through which more than 200 communities can have their own local voices. But over-the-air local TV stations -- particularly those in smaller markets -- can survive only by generating advertising revenue based on local viewership. If new technologies can override program exclusivity rights of local stations by offering the same programs on stations imported from other markets, or effectively block their subscribers access to local signals, the viability of local TV stations -- and their ability to serve their communities with the highest-quality programming -- is put at risk.

To preserve this public access to free-over-the air television, policy-makers must continue to support the principles of localism and of local station program exclusivity. These are the principles that underlie the policies of syndicated exclusivity, network non-duplication, must-carry and retransmission consent. These policies help preserve the health of the free-over-the air television upon which the American public relies.

### ***Localism***

The fundamental policy of localism has been embedded in federal law since the Radio Act of 1927.<sup>1/</sup> The objective of localism in the broadcast industry is “to afford each community of appreciable size an over-the-air source of information and an outlet for exchange on matters of local concern.” *Turner Broadcasting Sys. v. FCC*, 512 U.S. 622, 663 (1994) (*Turner I*); see *United States v. Southwestern Cable Co.*, 392 U.S. 157, 174 & n.39 (1968) (same). As pointed out by the Supreme Court, that policy has provided crucial public interest benefits.

Broadcast television is an important source of information to many Americans. Though it is but one of many means for communication, by tradition and use for decades now it has been an essential part of the national discourse on subjects across the

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<sup>1/</sup> *Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act*, First Report and Order, 14 FCC Rcd 2654, 2659 (1999); see *Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act*, Notice of Proposed Rulemaking, 13 FCC Rcd 22977, 22979 (1998) (“The network station compulsory licenses created by the Satellite Home Viewer Act are limited because Congress recognized the importance that the network-affiliate relationship plays in delivering free, over-the-air broadcasts to American families, and because of the value of localism in broadcasting. Localism, a principle underlying the broadcast service since the Radio Act of 1927, serves the public interest by making available to local citizens information of interest to the local community (*e.g.*, local news, information on local weather, and information on community events). Congress was concerned that without copyright protection, the economic viability of local stations, specifically those affiliated with national broadcast network[s], might be jeopardized, thus undermining one important source of local information.”)

whole broad spectrum of speech, thought, and expression. *Turner Broadcasting Sys. v. FCC*, 117 S. Ct. 1174, 1188 (1997).

Thanks to the vigilance of Congress and the FCC over the past 50 years in protecting the rights of local stations, over-the-air television stations today serve more than 200 local markets across the United States, including markets as small as Presque Isle, Maine (with only 28,000 television households), North Platte, Nebraska (with fewer than 15,000 television households), and Glendive, Montana (with only 3,900 television households).

This success is largely the result of the partnership between broadcast networks and affiliated television stations in markets across the country. The programming offered by network affiliated stations is, of course, available over-the-air for free to local viewers. Although other technologies offer alternative ways to obtain television programming, tens of millions of Americans still rely on broadcast stations as their exclusive source of television programming and broadcast stations continue to offer most of the top-rated programming on television.

The network/affiliate system provides a service that is very different from nonbroadcast networks. Each network affiliated station offers a unique mix of national programming provided by its network, local programming produced by the station itself, and syndicated programs acquired by the station from third parties. H.R. Rep. 100-887, pt. 2, at 19-20 (1988) (describing network/affiliate system, and concluding that “historically and currently the network-affiliate partnership serves the broad public interest.”) Unlike nonbroadcast networks such as Nickelodeon or USA Network, which telecast the same material to all viewers nationally, each network affiliate provides a

customized blend of programming suited to its community -- in the Supreme Court's words, a "local voice."

America's local television broadcast stations make an enormous contribution to their communities because broadcasters are uniquely positioned to help community organizations promote their causes, through media saturation and attention from local on-air talent. Broadcasters help give an organization a voice, and are the main conduit for members of a community to discuss the issues of the day amongst themselves. A broadcaster can help an organization make its case directly to local citizens, to raise its public profile in a unique way, and to cement connections within local communities. A broadcaster can help an organization better leverage its fund raising resources and expertise, its public awareness and its educational efforts.

Community-responsive programming -- along with day-to-day local news, weather, and public affairs programs -- is made possible, in part, by the sale of local advertising time during and adjacent to network programs. These programs (such as "CSI" and "American Idol") often command large audiences, and the sale of local advertising slots during and adjacent to these programs is a crucial revenue source for local stations.

### ***Local Program Exclusivity***

The FCC has recognized the need for strong and effective rules enabling television stations to preserve the exclusivity of programming in their local markets since the earliest days of cable. The first cable rules, for example, were non-duplication rules to protect both network programming and syndicated programming for which local

broadcasters had negotiated exclusive exhibition rights.<sup>2</sup> The basic principle was that non-duplication was “something to which a station is entitled, without a showing of special need, within its basic market area.”<sup>3</sup> The FCC explained:

Our aim . . . is not to take any programs away from any CATV subscriber, but to preserve to local stations the credit to which they are entitled – in the eyes of the advertisers and the public – for presenting programs for which they had bargained and paid in the competitive program market.<sup>4</sup>

In 1972, the FCC adopted its first rules authorizing stations that had purchased local exclusive exhibition rights to syndicated programming to demand that cable systems located in their service areas delete such programming from imported distant signals.<sup>5</sup> While these rules were repealed in 1980<sup>6</sup>, eight years later the FCC reinstated a revised set of syndicated exclusivity rules as well as revising and strengthening the network non-duplication rules.<sup>7</sup> The FCC concluded that:

The restoration of syndicated exclusivity protection will enhance competition in the video marketplace by eliminating unfairness to broadcasters. It will increase incentives to supply the programs viewers want to see and it will encourage the development of a pattern of distribution that makes the best use of the particular

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<sup>2</sup> *Amendment of Subpart L, Part 11 to Adopt Rules and Regulations to Govern the Grant of Authorization in the Business Radio Service for Microwave Stations to Relay Television Signals to Community Antenna Systems*, First Report and Order, 38 FCC 683 (1965).

<sup>3</sup> *Id.*, at 719.

<sup>4</sup> *Id.*, at 715 (emphasis added).

<sup>5</sup> *Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems, and Inquiry into the Development of Communications Technology and Services to Formulate Regulatory Policy and rulemaking and/or Legislative Proposals*, 36 FCC 2d 141, 148 (1972) (hereinafter cited as “*Cable Television Report and Order*”), recon. granted, 36 FCC 2d 326 (1972) (hereinafter cited as “*Reconsideration Order*”).

<sup>6</sup> *Cable Television Syndicated Program Exclusivity Rules*, Report and Order, 79 FCC 2d 663 (1980) (hereinafter “*1980 Report and Order*”).

<sup>7</sup> *1988 Report and Order*.

advantages of different distribution outlets. It will encourage promotion of programming. Although cable operators may have to make some changes in the way they do business, compliance costs will not be burdensome and, in any event, are outweighed by benefits. Specifically, television viewers generally will be exposed to richer and more diverse programming.<sup>8</sup>

In addition to reinstating the syndicated exclusivity rules, the *1988 Report and Order* also expanded the scope of protection that network affiliates could enforce under the network non-duplication rules. Quoting approvingly from CBS' comments, the FCC concluded that:

In a word, the relationship between broadcast network and its affiliates is one of intense symbiosis. It is fundamentally premised both on the network's ability to acquire exclusive rights from its suppliers, and on the affiliated stations' ability to enjoy program exclusivity in their respective marketplaces. This vital feature of the system of free over-the-air television has been true for over forty years.<sup>9</sup>

In a similar vein, when Congress crafted the original Satellite Home Viewer Act in 1988, it emphasized that the legislation "respects the network/affiliate relationship and promotes localism." H.R. Rep. No. 100-887, pt. 1, at 20 (1988). It also found that "depriving local stations of the ability to enforce their program constraints could cause an erosion of audiences for such local stations because their programming would no longer

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<sup>8</sup> *Id.*, at ¶ 89. See *Amendment of Parts 73 and 76, of the Commission's Rules Relating To Program Exclusivity in the Cable and Broadcast Industries*, Memorandum Opinion and Order, 4 FCC Rcd 2711, ¶ 24 (1989) ("In reinstating our syndex rules, we are attempting to remove unnecessary impediments on broadcasters' right to contract (thereby enhancing competition) and to provide an environment that is more conducive over the long run to the production, diversity, responsiveness, quality and distribution of programming in order to ensure that consumers receive an optimal mix of programming.").

<sup>9</sup> *Id.*, at ¶ 116. The FCC cited to record evidence that when a small market Palm Springs affiliate lost non-duplication protection, it lost half of its audience to an imported distant affiliate. *Id.*, at 117.

be unique and distinctive.<sup>10</sup> And when Congress extended the distant-signal compulsory license in 1999, it reaffirmed the importance of localism as fundamental to the American television system. For example, the 1999 SHVIA Conference Report says this:

“[T]he Conference Committee reasserts the importance of protecting and fostering the system of television networks as they relate to the concept of localism. . . . [T]elevision broadcast stations provide valuable programming tailored to local needs, such as news, weather, special announcements and information related to local activities. To that end, the Committee has structured the copyright licensing regime for satellite to encourage and promote retransmissions by satellite of local television broadcast stations to subscribers who reside in the local markets of those stations.” SHVIA Conference Report, 145 Cong. Rec. H11792 (daily ed. Nov. 9, 1999).

In addition, the legislative history of SHVERA reinforces the importance of program exclusivity, particularly to broadcast localism. For example, Congressman Dingell noted during floor debates regarding SHVERA:

[T]he act will protect consumers and foster localism by ensuring that satellite customers receive all of their local broadcast signals when these signals become available via satellite. Local broadcasters provide their communities with important local programming. Whether it is local news, weather, or community events, these broadcasters are there, on the ground serving their friends and neighbors. See Congressional Record, H8223, October 6, 2004, H.R. 4518

The FCC has clearly articulated how localism and the ability of local television stations to fulfill their public interest obligations are inextricably linked to their ability to enforce local market program exclusivity. In its *1988 Report and Order*, the Commission said:

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<sup>10</sup> H.R. Rep. No. 887 Part 2, 100<sup>th</sup> Cong. 2<sup>nd</sup> Sess. 26 (1988).



In fulfilling our responsibility under Sections 301, 307(b), and 309, we believe the public interest requires that free, local, over-the-air broadcasting be given full opportunity to meet its public interest obligations. An essential element of this responsibility is to create a local television market that allows local broadcasters to compete fully and fairly with other marketplace participants. Promoting fair competition between free, over-the-air broadcasting and cable helps ensure that local communities will be presented with the most attractive and diverse programming possible. Local broadcast signals make a significant contribution to this diverse mix. As we documented previously, the absence of syndicated exclusivity places local broadcasters at a competitive disadvantage. Lack of exclusivity protection distorts the local television market to the detriment of the viewing public, especially those who do not subscribe to cable. Our regulatory scheme should not be structured so as to impair a local broadcaster's ability to compete. Restoration of our syndicated exclusivity rules will provide more balance to the marketplace and assist broadcasters in meeting the needs of the communities they are licensed to serve.<sup>11</sup>

From a policy perspective, there is no benefit - and many drawbacks - to delivery of distant signals with programming that duplicates local station programming. Unlike local stations, distant stations do not provide viewers with their *own* local news, weather, emergency, and public service programming. Viewership of competing programming on distant stations provides no financial benefit to *local* stations to help fund their free, over-the-air service. To the contrary, duplicative distant signals, when delivered to any household that can receive local over-the-air stations, simply siphon off audiences and diminish the revenues that would otherwise go to support free, over-the-air programming.

The need for local station program exclusivity in medium and small sized markets is particularly acute. Many of these markets operate in areas overshadowed by larger markets and have relatively sparse and more diffuse population densities. That is why the

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<sup>11</sup> 1988 Report and Order, at ¶ 74.

Commission, early on, provided smaller markets with an extra wide zone of program exclusivity protection.

None of the facts or premises underlying the FCC's determination that this extra zone of protection was needed<sup>12</sup> has changed since 1975. If anything, the position of broadcasters has become more precarious; especially for affiliates in hundred plus markets that usually operate on a slimmer profit margin and are less likely to be profitable.<sup>13</sup> The erosion of even a few percentage points of revenue caused by a reduction in the non-duplication protection zone will undoubtedly affect the service they can provide to their communities.

### ***Must Carry/Retransmission Consent***

Must-carry and retransmission rights are also an important part of the local broadcast equation. In the Cable Television Consumer Protection and Competition Act of 1992,<sup>14</sup> Congress expressed its belief that revisions in the law was necessary to ensure the continued viability of: (1) free-over-the-air television broadcast service, and (2) the benefits derived from local origination of programming. Congress recognized that because cable systems and broadcasters compete for advertising revenue and programming, and because cable operators would have an interest in favoring affiliated programmers, the cable provider would also have an incentive to delete, reposition, or refuse to carry local television broadcast stations. At the same time, Congress also

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<sup>12</sup> *Id.*

<sup>13</sup> In 2004 the profit margins for the average affiliate station in ADI markets 101-125, 126-150, 151-175, and 176 plus were 8.4%, 0.6%, 10.6%, and 1.4%, respectively, and the average Pre-Tax profits for affiliates in these markets were \$616,000, \$30,000, \$475,000, and \$39,000, respectively.

<sup>14</sup> See Pub. L. No. 102-385, 106 Stat. 1460, codified at 47 U.S.C. § 521 *et seq.*

recognized that cable systems had, in many instances, received great benefits from local broadcast signals in the form of subscribership and increased audience for cable programming services even though they had been able to exploit a broadcaster's signal without its consent. Accordingly, the 1992 Cable Act adopted a mechanism whereby stations could elect between assured carriage (must carry) and no compensation, or retransmission consent, where the station and the cable operator negotiated over the terms and conditions of carriage.

In upholding the must carry rules, the Supreme Court recognized the "important federal interest" in "protecting noncable households from loss of regular television broadcasting." <sup>15</sup> The Court described the interest in ensuring public access to the multiplicity of programming . . . services . . . that over-the-air broadcasting offered as "governmental purpose of the highest order." <sup>16</sup> And, both Congress and the Court have acknowledged that the legitimate public policy goal would not be "satisfied by a rump broadcasting industry providing a minimum of broadcast service to Americans without cable." <sup>17</sup>

The fundamental policies and basic facts that cause Congress to adopt must carry requirements are as sound today as they were in 1992. Some 20.3 million U.S. households receive television service solely over-the-air. Many of these viewers choose not to subscribe to pay television services for well thought out and legitimate reasons. For example, they do not want to be locked into the ever-increasing costs of pay

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<sup>15</sup> Turner, 520 U.S. at 190 (quoting *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714 (1984)).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 1187.

television service and they have additional sets that are not hooked up to cable or satellite, among others. They feel well-served by the locally-oriented and public interest programming they receive over the air and do not see the need for expensive pay television services.

But there are also a large number of viewers who cannot afford pay television. Twelve percent of American households fall below the poverty line.<sup>18</sup> They should not be forced by government policy into paying subscriber fees that only escalate over time and that they cannot afford. They deserve as an option a vibrant, over-the-air service that provides the benefits of new digital technologies. Must-carry is necessary to preserve this option.

A station's second option under the 1992 Cable Act, retransmission consent, has also worked well. Many stations, including some of LIN's stations, have used retransmission consent to create and improve mechanisms that better serve their local communities and regions. LIN has used retransmission consent in some of its markets to launch separate cable channels providing local weather information. Here in the Washington, D.C., area, Albritton Communications, owner of ABC affiliate Channel 7, has used retransmission consent to launch News Channel 8 that provides ten hours of local news, weather and public affairs programming zoned separately for Washington and its suburbs.

In short, the must carry/retransmission consent regime in the 1992 Cable Act has worked as Congress intended in protecting the free over-the-air broadcasting system and

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<sup>18</sup> See *Census Bureau says 1.3 million more slipped into poverty last year; health care coverage also drops*, CNN Money (Aug. 26, 2004), available at [http://money.cnn.com/2004/08/26/news/economy/poverty\\_survey](http://money.cnn.com/2004/08/26/news/economy/poverty_survey).

providing a mechanism to help that system improve service to the local communities it serves.

### ***Conclusion***

Because broadcast television is universally available and is the only service used by millions of Americans, when considering public policies to apply to new technologies such as video over broadband, we urge you to adopt the same principles of local market program exclusivity, must carry, and retransmission consent that have served broadcasting and its local viewers so well for the last thirteen years. This will not only help ensure the continued viability of a free over-the-air locally oriented broadcasting service, it will also provide a level playing field whereby existing video production delivery services and any new services play by the same rules.